No. 82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, AND McGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JOHN N. ROMANS
ROBERT S. LIPTON
101 Park Avenue
New York, New York 10178
(212) 696-6000
Counsel for Petitioner,
Trans World Airlines, Inc.

CURTIS, MALLET-PREVOST,
COLT & MOSLE
SCOTT J. McKAY WOLAS
MICHAEL L. M. QUINTTUS
Of Counsel

January 13, 1983

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 999—August Term, 1981

(Argued April 22, 1982 Decided September 28, 1982)

Docket No. 82-7012

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of

gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services, Limited.*

JOHN N. ROMANS, New York, New York (Robert S. Lipton, Scott J. McKay Wolas, Curtis, Mallet-Prevost, Colt & Mosley, New York, New York, of counsel) *for Defendant-Appellee Trans World Airlines, Inc.*

(Robert B. Hemley, Norman Williams, Gravel, Shea & Wright, Burlington, Vermont, of counsel) *for Amici-Curiae Jacques Roulin and Hugh Harley.*

WINTER, *Circuit Judge*:

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's

liability under the Warsaw Convention ("Convention")[1] for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs $6,475.98. 525 F.Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March, 1979, plaintiffs Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than $6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.[2] Because of the absence of a special

1 The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

2 Article 18 of the Convention reads:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or

declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of which the passenger takes charge himself."[3] The various limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine

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goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

3 Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that this standard "has been . . . espoused by the Civil Aero-

nautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F.Supp at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra,* and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniform-

ity of legal obligation given the expected international character of the industry. *See* A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); *see also Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) *and* CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the developed countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.[4]

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[4] In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs or $16,600. Lowenfeld and Mendelsohn at 504-09. The United States unenthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never ratified the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of $50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of

Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. *See* Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc

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1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to $75,000 on all flights into or out of the United States." *Reed v. Wiser*, 555 F.2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to $100,000 at the then current exchange rate of $35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).[5]

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as unit of account posed no problem for United States Courts or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at $35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), it promised to maintain (and, if necessary, redeem) the value of United States dollars in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.[6] From 1955, however, the United States faced a persistent

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5 There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a *currency unit* consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

6 *See* P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.[7] To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately $24 billion to around $10 billion.[8]

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton Woods[9]—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August, 1971, the United States suspended its commitment to convert dollars for gold.[10] In May, 1972, it devalued the dollar by raising the official price of gold to $38 per ounce. *See* Par Value Modification Act, Pub. L.

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7 *Id.* at 690-91.

8 *Id.* at 691, Figure 36-1.

9 *See* Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

10 *Id.* at 641; Asser, *supra* note 6, at 651.

No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October, 1973, yet another devaluation raised the price to $42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of 1973 and the abolition of the official price of gold.[11] Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR

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[11] In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of gold certificates. See 31 U.S.C. § 4056. The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold . . . ." S. Rep. No. 94-1295, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5935, 5966-67.

was calculated in terms of gold.[12] With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies.[13] The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been ratified.

Meanwhile, parties to the Convention have utilized a variety of units of conversion. The record shows Sweden and Britain have adopted SDR's for purposes of Warsaw.[14] Both a Netherlands court and the Civil Court of Rome reached the same result.[15] Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.[16] The United States District Court in the Southern District of Texas recently opted for the free market price of gold,[17] the standard

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12 Gold, *supra* note 10, at 345.

13 Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1. 3 (1981).

14 *See* Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); *see also* the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

15 *State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aeree Italiane v. Ricciole* (Rome Civil Court Judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

16 *See Chamie v. Egyptiar* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

17 *Boehringer Mannheim Diagnotecs, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981).

utilized by an Indian court,[18] and a Greek court.[19] Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980,* 535 F.Supp. 833 (E.D.N.Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations on TWA's liability in this case ranging from less than $6,500 to over $400,000, each has been adopted as the proper unit of account by at least one party, or domestic

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18 *Kuwait Airways Corp. v. Sanghi,* Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71.)

19 *Zakoapolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54.)

tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last" official price of gold is offered as a possible unit, "last" is really a euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States.[20] We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continua-

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[20] The sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates. *See* note 12, *supra*. That is not relevant to the issues here.

tion of that order is based ultimately on a policy determination that the last official price is the best available standard.[21] The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability. The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would amou t to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and foreign exchange as an international reserve

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21 CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

22 Appellant's reliance on dicta in our decision *Reed v. Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U.S. has not ratified.

asset."[23] "[M]ember central banks may exchange SDR's for other convertible currencies and, therefore, SDR balances are actually lines of credit against which reserves may be borrowed for use in central bank operations."[24] As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates."[25]

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself con-

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23 Ward, *supra* note 14, at 2.

24 *Id.*

25 *Id.* at 3.

tains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty negotiation and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U.S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57

(1853). While federal courts are necessarily called upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); *see also id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and ratification on the other. *See Baker v. Carr,* 369 U.S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.[26] *See, e.g., Goldwater v. Carter,* 444 U.S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty ratification by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to

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26 Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney v. Robertson,* 124 U.S. 190, 194 (1887); *see also Terlinden v. Ames,* 184 U.S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney v. Robertson,* 124 U.S. at 195.

convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.[27]

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs

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[27] The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

Docket Number
82-7012

United States Court of Appeals
FOR THE SECOND CIRCUIT

FRANKLIN MINT CORPORATION, *et al.*,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

NOTICE OF MOTION
for Stay of Issuance of Mandate

Motion By:

CURTIS, MALLET-PREVOST, COLT & MOSLE
Robert S. Lipton, Esq.
(212) 696-6045

Has a request of opposing counsel for consent been refused?	☒ Yes	☐ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired? *(Substantive motions only)*	☐ Yes	☒ No

Requested return date:
(See Second Circuit Rule 27(b))
Date of argument of appeal, if scheduled:
Judge or agency whose order is being appealed:

OPPOSING COUNSEL: *(Name and tel. no. of attorney in charge)*

WAESCHE, SHEINBAUM & O'REGAN, P.C.
John R. Foster, Esq.
(212) 227-3550

Brief statement of the relief requested: **Order staying the issuance of mandate in this case pending the filing by defendant-**

appellee Trans World Airlines, Inc. ("TWA") of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: Whether an order staying issuance of the mandate in this case should be entered since TWA expects and intends to make proper and timely application to the Supreme Court of the United States by a petition for writ of certiorari for review of certain aspects of the decision and judgment of this Court in this case.

Brief statement of the facts (with page references to the moving papers): The relevant factual background is set forth at paragraphs 2 and 3 of the Affidavit of John N. Romans, sworn to on December 6, 1982, and submitted in support of this motion.

Summary of the argument (with page references to the moving papers): Pursuant to the provisions of Section 2101(f), Title 28 U.S.C. and Rule 41(b) of the Federal Rules of Appellate Procedure, an order should be entered staying issuance of the mandate in this case on the ground that it is the *bona fide* intention of TWA to make proper application to the Supreme Court within the time allowed by law for a writ of certiorari. The grounds upon which TWA's petition for certiorari will be based are set forth at paragraph 5 of the Romans Affidavit mentioned above.

12/7/82
Date

ROBERT S. LIPTON
The name signed must be printed beneath

Robert S. Lipton
Attorney for Defendant-Appellee.

ORDER

IT IS HEREBY ORDERED
that the motion be and it hereby
is *granted*

JAMES L. OAKES

Hon. James L. Oakes

RICHARD J. CARDAMONE

Hon. Richard J. Cardamone

RALPH K. WINTER

Hon. Ralph K. Winter

December 17, 1982

United States Court of Appeals

SECOND CIRCUIT

No. 82-7012

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December one thousand nine hundred and eighty-two.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Trans World Airlines, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, *Clerk*

by:

FRANCIS X. GINDHART

Francis X. Gindhart
Chief Deputy Clerk

United States District Court
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.

Defendant.

Whitman Knapp, D.J.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin $544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at $250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of delivery, a shipper's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

> "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine

> hundred thousandths [the so-called Poincare franc]. These sums may *be converted into any national currency* in round figures." (Emphasis added.)

Counsel for TWA, in an extraordinarily lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days' notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of $6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

Dated: New York, New York
November 6, 1981

.....
Whitman Knapp, U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

ORDER

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED and MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

APPEARANCES

For Plaintiffs: WAESCHE, SHEINBAUM & O'REGAN
120 Broadway
New York, New York 10271
John Foster, Esq.

For Defendants: CURTIS, MALLET-PREVOST, COLT & MOSLE
100 Wall Street
New York, New York 10005
John R. Romans, Esq.

WHITMAN KNAPP, D.J.

The first sentence of the second paragraph of our November 6, 1981 Memorandum and Order is hereby amended to read:

> "Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram."

SO ORDERED.

Dated: New York, New York
December 18, 1981

.....

Whitman Knapp, U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)
ORDER AND JUDGMENT

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED and MCGREGOR, SWIRE AIR SERVICES, LTD.,

Plaintiffs,

— against —

TRANS WORLD AIRLINES, INC.,

Defendant.

For the reasons stated in the Memorandum and Order of this Court, dated November 6, 1981, it is

ORDERED ADJUDGED AND DECREED: that the maximum liability herein of defendant Trans World Airlines, Inc. shall be determined under Article 22 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et. seq.* (1934), T.S. 876, *reprinted in* 49 U.S.C. § 1502 note (1970), by a conversion factor premised on the last official price of gold in the United States, and it is

FURTHER ORDERED, that in accordance with the foregoing conversion factor, final judgment shall be entered for plaintiffs in the amount of $6,475.98, plus interest and costs.

Dated: New York, New York
December 3, 1981

WHITMAN KNAPP

WHITMAN KNAPP
U.S.D.J.

JUDGMENT ENTERED 12/4/81

RAYMOND F. BURGHARDT

Clerk

81 Civ. 1700 (WK)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

NOTICE OF MOTION; AFFIDAVIT

MOTION DENIED

December 16, 1981

WHITMAN KNAPP

Whitman Knapp
U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

NOTICE OF MOTION

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

PLEASE TAKE NOTICE that on the Court's Memorandum and Order dated November 6, 1981; on the Court's Order and Judgment dated December 3, 1981; on the affidavit sworn to by John R. Foster on December 14, 1981, attached hereto; on the memorandum of law submitted herewith; and on all the prior pleadings and proceedings had in this action, the undersigned will move this Court before the Honorable Whitman Knapp, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on January 8, 1982, at 2:00 p.m., or as soon thereafter as counsel may be heard, for an order pursuant to rule 59(e) of the Federal Rules of Civil Procedure amending the Court's Order and Judgment of December 3, 1981, by determining defendant Trans World Airlines, Inc.'s liability

under Articles 18 and 22 of the Warsaw Convention in accordance with the free-market price of gold, and for such other and further relief as to the Court may seem just and equitable.

Dated: New York, New York
December 14, 1981

WAESCHE, SHEINBAUM & O'REGAN, P.C.
Attorneys for Plaintiffs

By: JOHN R. FOSTER

John R. Foster
120 Broadway, Suite 1825
New York, New York 10271
(212) 227-3550

CONSTITUTION OF THE UNITED STATES

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Article 22

(1) In the transportation of passengers, the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Order 74-1-16

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 26274

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 3rd day of January, 1974

IN THE MATTER OF WARSAW CONVENTION LIABILITY LIMITATIONS AS EXPRESSED IN U. S. DOLLARS

ORDER

Section 221.38(j) of the Board's Regulations requires U. S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T.S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from $35 per ounce to approximately $38 which took place effective May 8, 1972, and such

revisions have been made. On September 21, 1973, Public Law 93-110 was enacted, further devaluating the U. S. dollar to approximately $42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.[1]

In view of the foregoing and of all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol[2] and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of 1958, and Part 221 of the Board's Regulations and they must be canceled.

---

1. With respect to their liability to passengers, this order will affect only a small proportion of the U. S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 F.R. 7302) pursuant to which they have filed tariffs providing for a $75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U. S. dollars, it is unaffected by the change in the gold value of the dollar.

2. The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

Convention and Protocol Minimum Liability	Actual	Rounded[3]
125,000 francs (per passenger, Convention only)	$10,002.90	$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974, on not less than 10 days' notice.

3. Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

APPENDIX A

U.S. CERTIFICATED SCHEDULED AIR CARRIERS

Airlift International, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Aspen Airways, Inc.
Braniff Airways, Inc.
Chicago Helicopter Airways, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Air Corp., d/b/a Hughes Airwest
Kodiak-Western Alaska Airlines, Inc.
Los Angeles Airways, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Aviation, Inc.
Reeve Aleutian Airways, Inc.
SFO Helicopter Airlines, Inc.
Seaboard World Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
The Flying Tiger Line Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.
Wien Air Alaska, Inc.

Wright Air Lines, Inc.

U.S. SUPPLEMENTAL AIR CARRIERS

Capitol International Airways, Inc.
Johnson Flying Service, Inc.
McCulloch International Airlines, Inc.
Modern Air Transport, Inc.
Overseas National Airways, Inc.
Royal International Airlines
Saturn Airways, Inc.
Southern Air Transport, Inc.
Standard Airways, Inc.
Trans International Airlines, Inc.
Universal Airlines, Inc.
World Airways, Inc.

U.S. AIR TAXI OPERATORS*

Aeromech, Inc.
Air East, Inc.
Air Indies Corporation
Air New England, Inc.
Air North, Inc.
Air South, Inc.
Air Wisconsin, Inc.
Alaska Aeronautical Industries, Inc.
Altair Airlines, Inc.
Antilles Air Boats, Inc.
Apache Airlines, Inc.
Apollo Aviation, Inc.
Atlantic City Airlines, Inc.
Bar Harbor Airways, Inc.
Cascade Airways, Inc.
Cochise Airlines, Inc.

* Includes only air taxi operators participating in tariffs for through rates, fares, and charges filed jointly with certificated air carriers.

Combs Airways, Inc.
Command Airways, Inc.
Commuter Airlines, Inc.
Crown Airways, Inc.
Downeast Airlines, Inc.
Execuair, Inc.
Executive Airlines, Inc.
Fischer Bros. Aviation, Inc.
Florida Airlines, Inc.
Golden West Airlines, Inc.
Henson Aviation, Inc.
Mackey International Air Commuter
Marco Island Airways, Inc.
Metroflight Airlines, Inc., d/b/a
Houston Metro Airlines
Midstate Air Commuter
Monmouth Airlines, Inc.
Pennsylvania Commuter Airlines,
Div. of Clark Aviation Corp.
Pocono Airlines, Inc.
Provincetown-Boston Airline, Inc., d/b/a
Provincetown-Boston Airline or Naples Airlines
Puerto Rico International Airlines, Inc.
Ransome Air, Inc.
Rio Airways, Inc.
Royale Airlines, Inc.
Sedalia-Marshall Boonville Stage Line, Inc.
Shawnee Airlines, Inc.
L. B. Smith
Southeast Airlines, Inc.
Suburban Airlines, Inc., a subsidiary of
Reading Aviation Service, Inc.
Swift Air Lines, Inc.
Travel Air Aviation, Inc.
Vercoa Air Service, Inc.
Winnepesaukee Aviation, Inc.

U.S. INDIRECT AIR CARRIERS

(Airfreight Forwarders and Air Express)

Add Airfreight Corp.
Aero Special Air Freight, Inc.
Air Cargo Expediters, Inc.
Air Cargo Specialists, Inc.
Air Freightways Corporation
Air-Land Freight Consolidators, Inc.
Air-Land Transport, Inc.
Air Overseas Corporation
Airport Packers, Inc., d/b/a
Airport Packers & Forwarders
Air Progress, Inc.
Air-Sea Forwarders, Inc.
Air Van Lines, Inc.
Airborne Freight Corporation
(a Delaware corporation)
The "AL" Naish Moving and Storage Company,
A Corporation
Alas Ibero Americanas, Inc.
Alberti Van & Storage Co., Inc., d/b/a
Mov Air
All-Airtransport, Inc.
All Carrier Transport, d/b/a
ACT Air Freight
All Hawaii Cargo Consolidators, Inc., d/b/a
A-One Air Freight
Allied Van Lines, Inc.
Allstates Air Cargo, Inc.
Ambassador Air Freight Corp.
Amerford International Corp., d/b/a
Amerford Air Cargo
American Ensign Van Service, Inc.
American Red Ball Transit Co., Inc.
American Van & Storage, Inc.
Amerpole Air Freight, Inc.

Anthony H. Osterkamp, Jr., d/b/a
Osterkamp Trucking
Apex Air Freight, Inc.
Apollo Air Freight Corporation
Armand J. Donati
Around the World Air Freight, Inc.
Anthony S. Arrico and Robert P. Landy, d/b/a
R. I. Air Freight Forwarders
Associated Air Freight, Inc.
(a Virginia corporation)
Aero Mayflower Transit Company, Inc.
Astro Air Express, Inc.
Astron Forwarding Company, Inc.
Atlas Van Lines International Corp.
Aztec Transportation Co., Inc., d/b/a
Aztec Air Freight
B & G Trucking, Inc.
Bader Bros. Van Lines, Inc.
Baker International Warehouse, Inc., d/b/a
Baker Air Cargo
Beacon Shipping Co., Inc.
Behring International, Inc.
Bekins International Lines, Inc.
Bellair Expediting Service, Inc.
Ben-Lee Motor Service Co., d/b/a
Mitchell Air Dispatch
Bennett & Taylor Trans., Inc.
J. E. Bernard & Co., Inc.
(a New York corporation)
Black & Geddes, Inc.
Bor-Air Freight Co., Inc.
Philip C. Borden, d/b/a
Borden Trucking
Brake Air Freight, Inc.
Bruce Transfer Corp.
Burlington Northern Air Freight, Inc.

A. F. Burstrom & Sons, Inc.
W. J. Byrnes and Company of New York, Inc.
Air Freight, Inc.
C&L Freight Lines, Inc., d/b/a
Commerce Air Freight
C-M-D Transport, Inc., d/b/a
C-M-D Air Forwarders
Cal-Air Forwarders, Inc.
Cal-Hawaiian Freight, Inc.
California Delivery Service (A Corp.)
Cargo Courier Air Freight, Inc.
Cargoair Forwarders, Inc.
Carmichael International Service, d/b/a
CIS Oceanair Services
Carolina Freight Carriers Corporation
Willis L. Carr and Charles D. Weist, d/b/a
Cates Carr Go
Cartwright International Van Lines, Inc.
Castelazo & Associates
Century Air Freight, Inc.
CF Air Freight, Inc.
Christman Corporation, d/b/a Christman Air Freight
Circle Airfreight Corp.
Clipper Express Company, d/b/a "Sky Ho!" Air Freight Division
Columbia Air/Frate, Inc.
Columbia Export Packers, Inc.
Com-Air Freight, Inc., d/b/a Comet Air Freight
Commercial Air-Frate, Inc.
Common Market Forwarders, Inc.
Connecticut Air Freight, Inc.
Continental Forwarders, Inc. (a Delaware corporation)
Corsair Air Cargo System, Inc.
F. X. Coughlin Co.
Crown Air Freight Corp.
D.J.C. Corporation, d/b/a Jones Air Freight
Data Air Distribution System Co., Inc.

Davidson Forwarding Company
Dean Forwarding Co., Inc.
Delcher Intercontinental Moving Service, Inc.
Woodrow W. De Witt, d/b/a De Witt Freight Forwarding
Distribution Centers, Inc., d/b/a Alpha Air Freight
District Moving & Storage, Inc., d/b/a District Containerized Express
Domestic Air Express, Inc.
Door to Door International, Inc.
Frank P. Dow Co., inc. (a Washington corporation)
Bruce Duncan Co., Inc., d/b/a Bruce Duncan Cargo
Emery Air Freight Corporation
Empire Carriers Corp., d/b/a Entico Air Freight Service
Empire Foreign Air Forwarders, Inc.
Engel Brothers, Inc.
Enterprise Shipping Corp.
Equine Express, Inc.
Euro-American Air Freight Forwarding Co., Inc.
Express Forwarding and Storage Co., Inc.
5 Star Air Freight Corporation
Fernstrom Storage and Van Company
Flying Horse Air Freight, Inc.
Footner and Company, Inc., d/b/a Rennie Footner Air Express Service
Foreign Trade Export Packing Corp., d/b/a Foreign Trade Export Company
44 Air Express Systems, Inc.
Fort Pitt Consolidators, Inc.
Forwardair, Inc.
Four Winds Forwarding, Inc.
The Francesco Parisi Forwarding Corporation, d/b/a Parisi Airfreight
Fresh Air, Inc., d/b/a Fresh Air Cargo
Fritz Air Freight
Frontier Freight Forwarders, Inc., d/b/a Frontier Freight Consolidators

Furman Air Freight Corp.
G. & H. Transportation, Inc., d/b/a G. & H. Air Freight
Gateway Aviation Co., Inc.
General Air Freight Corp.—Domestic
General Air Freight Corp.
General Transpac System, d/b/a GTS Airfreight
Genex Airfreight, Inc.
Gilbert Air Transport Corp.
Global Forwarding, Inc.
Globe Shipping Co., Inc.
Gold Wings Ltd.
Golden Gate Air Freight, Inc.
Graf Air Freight, Inc.
Arnold S. Grant, d/b/a LeMark Air Freight Service
Greene Air International, Inc.
HC & D Forwarders International, Inc.
Hallmark Cargo Services, Inc.
Hall Expediting, Inc.
Harle Consolidators International (HARLE-CON), A division of Harle Services, Inc.
Harlo-Air Cargo Brokers, Inc.
Hemisphere Air Freight, Inc.
Home-Pack Transport, Inc.
Hop Air Freight Forwarders, Inc.
I & T Air Freight Forwarders, Inc.
Imperial Air Freight Service, Inc. (a New Jersey corporation)
Imperial Van Lines International, Inc.
Industrial Air Cargo, Inc.
Inter-Maritime Forwarding Co., Inc.
International Air Courier, Inc.
International Customs Service, Inc.
International Export Packers, Inc.
Interstate Dress Carriers, Inc.
Intra-Mar Shipping Corporation
Jet Air Freight
Jet Forwarding, Inc.

Joyce Expediting Service, Inc.
Karevan, Inc.
Karr, Ellis & Co., Inc.
Kerner Trucking Service, Inc., d/b/a KTS Air Freight Key Air Freight, Inc.
Kimberlin Air Freight Corp.
King Van Lines, Inc.
Bernard Klainberg, d/b/a Berklay Air Services Corp.
L.T.C. Air Cargo, Inc.
La Belle Air Freight, Inc.
Landair Corporation
Richard Thomas Light, d/b/a Westchester Air Freight
Loomis Courier Service, Inc.
Luigi Serra, Inc.
John J. McCabe Agency, Inc.
McLean Cargo Specialists, Inc.
Maris Van & Storage, d/b/a Maris Air Transport Division
Mark IV Air Freight, Inc.
Mercury Motor Express, Inc. (Mercury)
New England Air Lift, Inc.
Herb B. Meyer & Co., Inc.
Midland Forwarding Corporation, d/b/a ABC Air Freight
Missouri Pacific Air Freight, Inc.
Monumental-Security Storage Co.
Murray Air Freight, Inc.
Murty Bros. Agency, Inc.
Mustang Trucking Company, Inc., d/b/a Mustang Air Freight
National Movers Co., Inc.
National Van Lines, Inc.
Nelsonair International, Inc.
Neptune World-Wide Moving, Inc.
Network Courier Service
Alex Nichols Agency, Inc..
North American Van Lines, Inc.
Northern Air Freight, Inc.
Novo Airfreight Corp.

Novo International Corp., d/b/a Novo International Airfreight
O.N.C. Forwarding, d/b/a Rocor Air Freight
Oceanic Forwarders Company, d/b/a Air-Oceanic Shippers
H. G. Ollendorff, Inc.
P.I.E. Air Freight Forwarding, Inc.
Pacific Alaska Forwarders, Inc., d/b/a Arctic Air Freight
Pacific Delivery System
Panalpina Airfreight, Inc., d/b/a Panalpina Airfreight System
Par Avion Corporation
Paulssen & Guice, Ltd.
Performance by Air, Inc.
Petry & Co.'s Foreign Express (a Division Trans-World Shipping Corporation)
Philadelphia Air Consolidators Assn., Inc.
Pilot Air Freight Corp.
Presto Delivery Service, Inc.
Prideair Freight, Ltd.
Priority Air Freight, Inc.
Profit by Air, Inc.
Pegasus Air Transport Co.
Perfect Pak Company
Puerto Rican Forwarding Company, d/b/a Active Air Freight
Qwikway Trucking Co., d/b/a Qwik Air
Railway Express Agency, Incorporated
Ramar Air Freight Corp.
Randy International Ltd.
Rapidair Freight
Reilly Expediting Service, Inc.
Republic Airmodal, Inc.
Republic Van and Storage Co., Inc.
Rex Air Freight, Inc.
Right-O-Way, Inc., d/b/a Right-O-Way Air Freight
Royal Air Freight Corp.
Rozay's Transfer
Saber Air Freight, Inc.
Santa Fe Air Freight Company

Satellite Air Freight, Inc.
Satin Air Freight, Inc.
Robert L. Schley, d/b/a Schley Shipping Company
Schreiber Air Freight, Inc.
Seariders, Inc.
Security Van Lines, Inc.
Senderex Cargo Company, Inc.
Sentry Air Freight Corp.
Service By Air Freight Forwarders, Inc.
Service Air Cargo
Sesko International, Inc.
Set Air Freight, Inc.
Shulman Air Freight, Inc.
Signalair, Inc.
Sincro Inter National
Sky-Hawk Forwarders, Inc.
Skyline Air Freight, Inc.
Skymaster, Inc.
J. D. Smith Inter-Ocean, Inc.
Southern Pacific Air Freight, Inc.
Star World Wide Forwarders, Inc.
Starck Van Lines, Inc.
Suarez Shipping Services, Inc.
Suddath Van Lines, Inc.
Sunpak Movers, Inc.
Superior Fast Freight, d/b/a Aero-Ex
Supreme Air Freight Corp.
Surf-Air, Inc.
H. E. Sutton Forwarding Co., Inc.
Swift Home-Wrap, Inc.
T.F.C. Air Freight, Inc.
Tally's Truck Line
Target Air Freight, Inc.
Three-B Freight Service, Inc.
Towne International Forwarding Inc.
Trans-Air Freight System, Inc.

Transcon Lines
Transport Express Inc.
Transpor Trade Corporation
Trans-Pacific Air Cargo
Tuya International Corp.
United News Transportation Co.
United Parcel Service Co.
United Van Lines, Inc.
U. S. Van Lines, Inc.
Usair Freight, Inc.
Vanpac Carriers, Inc.
Ven-Air Service, Inc.
Virgil's Delivery Service, Inc., d/b/a Virgil's Air Cargo
Von Der Ahe Van Lines, Inc.
B. Von Paris & Sons, Inc.
WTC Air Freight
WTC Forwarding Corp.
Benjamin H. Walder & Rubin Konlon, d/b/a Chicagoland Air Freight
Wallkill Air Freight Corporation, d/b/a Atlas Air Cargo
Wells Fargo Air Express, Inc.
Wheaton Van Lines, Inc.
James G. Wiley Co.
Wilson Air Freight, Inc.
Wings and Wheels Express, Inc.
Wings and Wheels Express, Inc., d/b/a Air Express International
Wits, Inc., d/b/a Wits Air Freight
World Trade Air Freight Services, Inc.
Wright Air Freight Corp.
W. R. Zanes & Co. of La. Inc., d/b/a Zanes Inter-Air Consolidators

FOREIGN INDIRECT AIR CARRIERS

Willy Peter Daetwyler, d/b/a Interamerican Airfreight Co.
Kinki Nippon Routist Co. (Japan), d/b/a Kintetsu World Express, Inc. (U.S.A.)
Kuehne & Nagel (Germany), d/b/a Kuehne & Nagel Air Freight, Inc.
Lep Transport, Ltd. (United Kingdom), d/b/a Lep Transport, Inc. (U.S.A.)
McGregor, Swire Air Services Limited, Inc. (U.K.)
Mitsui Air & Sea Service Co., Ltd. (Japan), d/b/a Mitsuiline Travel Service of America, Inc. (U.S.A.)
Nippon Express Co., Ltd.
Pandair Freight Limited (U.K.)
Union Speditions—Gesellschaft m.b.H. Union Air Transport
Yusen Air & Sea Service Company Limited (Japan), d/b/a Yusen Air & Sea Service (U.S.A.) Incorporated

APPENDIX A

FOREIGN AIR CARRIERS**

Adastra Aviation Limited
Aden Airways Limited
Aer Lingus Teoranta
Aerlinte Eireann Teoranta
Aereo Fletes Internacionales, S.A. (AFISA)
Aero Lineas Flecha Austral Limitada
Aero Spacelines, Inc.
Aero Trades (Western) Ltd.
Aerocosta, S.A.
Aerolineas Argentinas
Aerolineas El Salvador, S.A.
Aerolineas Del Ecuador, S.A.
Aerolineas Peruanas, S.A.
Aerolinee Itavia—S.p.A.
Aeromar C. por A.
Aeronaves de Mexico, S.A.
Aeronaves del Ecuador, S.A.
Aeronaves del Peru, S.A.
Aerotransportes Entre Rios S.R.L.
Aerovias Colombianas Limitada (ARCA)
Aerovias Condor de Colombia Ltda.
Aerovias Lansa, S. de R.L.
Aerovias Nacionales de Colombia, S.A.
Aerovias Quisqueyana, C. por A.
Aerovias Venezolanas, S.A.
Air Afrique
Air BVI Limited
Air Canada
Air Ceylon, Limited
Air Haiti, S.A.

** Includes carriers by air of foreign countries which do not operate to/from the United States, but participate in joint tariffs in air transportation.

Air-India
Air Jamaica (1968) Limited
Air Liban (Lignes Aeriennes Libanaises)
Air Malawi Limited
Air Nauru
Air New Zealand Limited
Air Rhodesia Corporation
AIR-SIAM Air Company Limited
AIR-VIETNAM
Air Zaire
Airlines Jersey Limited T/A. British United C.I. Airways
Alia-The Royal Jordanian Airlines Corporation
Alitalia-Linee Aeree Italiane—S.p.A.
All Nippon Airways Company, Ltd.
ALM Dutch Antillean Airlines
Ansett—ANA (A division of Ansette Transport Industries (Operations) Pty. Ltd.)
Argo, S.A.
Ariana Afghan Airlines Co., Ltd.
Australian National Airlines Commission, Trading as Trans-Australia Airlines
Austrian Airlines, Österreichische Luftverkehrs—Aktiengesellschaft
Aviacion y Comercio, S.A.
B.K.S. Air Transport Limited
Bahamas Airways Limited
Balair AG
Belairco Aviation Inc. (Doing business as Bellingham-Seattle Airways)
Britannia Airways Limited
British Caledonian Airways, Limited
British European Airways Corporation
British Midland Airways Limited
British Overseas Airways Corporation
British United Airways Limited
British West Indian Airways Limited

BEA Airtours Limited
Cambrian Airways Limited
Canadian Pacific Airlines, Limited
Canadian Voyageur Airlines Limited
Caraibische Lucht Transport Maatschappij, N.V. (Caribbean Air Transport Company, Inc.)
Caribwest Airways Limited
Cathay Pacific Airways, Limited
Cayman Airways Limited
Central African Airways Corporation
Central African Airways Limited
Ceskoslovenske Aerolinie
Channel Airways Limited
China Airlines, Ltd.
Civil Air Transport Company Limited
Collingwood Air Services Limited
Compagnie Nationale Air France
Compagnie Nationale de Transports Aeriens (Royal Air Maroc)
Commuter Air Services Ltd.
Compania de Aviacion Faucett, S.A.
Compania de Dominicana de Aviacion, C. por A.
Compania Ecuatoriana de Aviacion, S.A.
Compania Internacional Aerea S.A. (CIASA)
Compania Mexicana de Aviacion, S.A.
Compania Panamena de Aviacion, S.A.
Compania Peruana Internacional de Aviacion S.A.
Conair Ltd.
Condor Flugdienst G.m.b.H.
Cross Canada Flights Ltd.
Cyprus Airways Limited
Deutsche Lufthansa Aktiengesellschaft (also operating as Lufthansa German Airlines)
D.T.A.—Linhas Aereas de Angola
Donaldson Line (Air Services) Limited, d/b/a Donaldson International Airways
East African Airways Corporation

Eastern Provincial Airways, (1963) Limited
Egypt Air
El Al Israel Airlines Limited
Emerald Airways Ltd.
Ethiopian Air Lines, Inc.
Fiji Airways Limited
Finnair Oy
Flugfelag Islands, H.F. (Icelandic Airways Ltd.)
General Department of International Air Services (Aeroflot, "Soviet Airlines")
Germanair Bedarfsluftfahrt Gesellschaft m.b.H. & Co. KG
Ghana Airways Corporation
Gibraltar Airways Limited
Gravenhurst Aviation Limited
Great Lakes Airlines Limited
Gulf Aviation Company
Guyana Airways Corporation
P. N. Garuda Indonesian Airways
Flightexec Limited
Empresa Guatemalteca de Aviacion
Harrison Airways Limited
Holland-America Lijn, n.v. (Netherlands) (Holland America Line)
Iberia, Lineas Aereas de Espana, S.A.
Indian Airlines Corporation
Inex Adria Airways
Internacional de Aviacion, S.A. (INAIR)
International Jet Air Ltd.
Iran National Airlines Corporation
Iraqi Airways
Japan Air Lines Company, Ltd.
Jugoslovenski Aerotransport (JAT)
Kar-Air OY
K.L.M. Royal Dutch Airlines
Korean Air Lines Co., Ltd.
Korea Air Terminal Service Co., Ltd. (Republic of Korea)

Kuoni Travel, Inc. (Kuoni Travel Limited (Switzerland) d/b/a)
Laker Airways Limited
Lansa, S. de R.L.
Lebanese International Airways
Leeward Air Transport Services Limited
Leeward Islands Air Transport Services Limited
Linea Aerea Nationale—Chile (LAN)
Linea Aeropostal Venezolana
Linea Aereas Costarricenses, S.A.
Lineas Aereas de Nicaragua, S.A.
Lloyd Aereo Boliviano, S.A.
Loftleidir H.F. Icelandic Airlines Ltd.
Luftverkehrsunternehmen Atlantis A.G.
LUXAIR—Societe Annonyme Luxembourgeoise de Navigation Aerienne
Malayan Airways Limited
Malaysia-Singapore Airlines Limited
MALEV—Hungarian Airlines
Martin's Luchtvervoer Maatschappij N.V. (Martin's Air Charter Company)
Mackenzie Air Ltd.
Middle East Airlines Airliban S.A.L.
Middle East Airlines Company, S.A.
New Zealand National Airways Corporation
Nigeria Airways, Ltd.
Nordair Ltee—Nordair Ltd.
North Canada Air Limited c.o.b. NORCANAIR
Olympic Airways S.A.
Out Island Airways Limited
Pacific Western Airlines, Ltd.
Pakistan International Airlines Corporation
Philippine Air Lines, Inc.
PLUNA, Primeras Lineas Uruguayas de Navegacion Aerea
Polskie Linie Lotnicze "LOT"
Ontario Central Airlines Limited
Orillia Air Services Limited

Polynesian Airlines Limited
Pomair N.V.
Qantas Airways Limited
Quebecair
Reseau Aerien Interinsulaire
Royal Air Cambodge
Royal Air Lao
Saudi Arabian Airlines
Scandinavian Airlines System
Seagreen Air Transport Limited
Servicio Aereo de Honduras, S.A.
Servicio Aereo de Transportes Commerciales (SATCO)
Servicios Aereos Cruzeiro Do Sul S.A.
Sociedad Aeronautica De Medellin Consolidada S.A. SAM
Societe Anonyme Belge d'Exploitation de la Navigation Aerienne (SABENA) (also operating as "SABENA" Belgian World Airlines)
South African Airways
Spantax, S.A.
Sudan Airways
Superior Airways Limited
Surinaamse Luchtvfracht Onderneming N.V. (Surinam Air Cargo Corporation)
SWISSAIR, Swiss Air Transport Company Limited
TACA International Airlines, S.A.
Tarom-Transporturile Aeriene Romine
Thai Airways International Ltd.
Thos. Cook & Son Inc. (U.S.) (Thos. Cook & Son (Continental and Overseas), Ltd. (Great Britain) d/b/a)
Trans-Australia Airlines
Trans Caribbean Airways
Trans-Mediterranean Airways S.A.L.
Transair Limited
Transavia, N.V.
Transmeridian Air Cargo Limited
Transportation Corporation of America

Transporte Aereo Rioplatense, S.A.C.E.I.
Transportes Aereos Benianos, S.A.
Transportes Aereos De Cargo, S.A. (Transcarga)
Transportes Aereos Nacionales S.A.
Transportes Aereos Portugueses, S.A.R.L.
Turk Hava Yollari Anonim Sirketi
Turks and Caicos Air Services, Ltd.
Union de Transports Aeriens (U.T.A.)
Union of Burma Airways Board
"VARIG", S.A. (Viacao Aerea Rio-Grandense)
Venezolana Internacional de Aviacion, S.A. (VIASA)
Viacao Aerea Sao Paulo, S/A "VASP"
Wagner Aviation Limited
Wardair Canada Ltd.
Windward Islands Airways International N.V.

Superior Court of California
CITY AND COUNTY OF SAN FRANCISCO

Department Law and Motion

August 25, 1982
No. 784512

ELECTRONIC MEMORIES AND MAGNETICS CORP.,

Plaintiff.

v.

THE FLYING TIGER LINE, INC., *et al.*

Defendant.

The cross-motions of plaintiff and defendant for partial summary judgment were heard and submitted for decision on August 10, 1982.

The motion of plaintiff is denied.

The motion of defendant for partial summary judgment is granted.

The Court determines that the last official U. S. price of gold at $42.22 per ounce shall be used in calculating the limit of liability under the Warsaw Convention.

.....

Judge of the Superior Court

JOHN B. HOOK, ESQUIRE
Long & Levit
Four Embarcadero Center, Suite 1800
San Francisco, CA 94111

JESS B. MILLIKAN, ESQUIRE
Derby, Cook, Quinby & Tweedt
333 Market Street, Suite 2800
San Francisco, CA 94105

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 81 C 4726

DEERE & COMPANY,

Plaintiff,

v.

DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT,

Defendant.

MEMORANDUM OPINION

This is an action in which plaintiff Deere & Company ("Deere") seeks recovery against defendant Deutsche Lufthansa Aktiengeselischaft ("Lufthansa") for damage to its IBM model 3032 computer that occurred during Lufthansa's transport of the computer from Chicago, Illinois, to Frankfurt, Germany. The computer was shipped in 14 packages. The package containing the director frame was damaged. Lufthansa has moved for summary judgment regarding the applicable standard governing limitation of its liability. Deere has filed a cross-motion for partial summary judgment. We grant Lufthansa's motion and deny Deere's motion.

In this memorandum opinion, we shall address one question: whether Lufthansa's liability for the damaged computer as set out in Article 22(2) of the Warsaw Convention—250 French gold francs per kilogram—is to be converted to United States dollars with reference to the exchange value of the current French franc, the former "official" price of gold, the free market price of gold, or the Special Drawing Right ("SDR") used by the International Monetary Fund.

In its motion for summary judgment, Lufthansa seeks to limit its liability under Article 22 of the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876,137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).[1] Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for baggage or goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs

> shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

At the time when Article 22 was drafted, gold served official monetary functions and its price was set by law. Since that time, in the United States[1] and the world, gold is no longer used as a standard of value; it no longer has an official price. Despite this change in the nature of the value of gold, Article 22, at least at the time of damage to the director frame, had not been amended to substitute a new standard of value for gold. Although the parties to the Warsaw Convention recognized the need for some amendment to Article 22, they could not agree upon one. The Civil Aeronautics Board, however, has continued to allow airlines to calculate their limitation of liability under the Warsaw Convention based upon the last official price of gold. The Board views this as a legal fiction which preserves the intention of the Warsaw Convention to limit the liability of air carriers. ***Boehringer Mannheim Diagnostics v. Pan Am***, 531 F. Supp. 344, 351-52 (S.D. Tex. 1981). Nevertheless, some courts have rejected calculating the limitation on liability based upon the last official

1. The official United States price of gold was abolished in 1978. Par Modification Act, Pub.L. No. 94-564, 90 Stat. 2660 (1976).

United States price of gold. *See, e.g., id.; Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981), *reversed*, No. 82-7012 (2d Cir. September 26, 1982).

We recognize that each of the solutions offered by the parties here and elsewhere[2] is easy to criticize. What is needed is a treaty amendment, but we do not have that. Therefore, we have to choose one of the other alternatives. The one which seems most nearly to effectuate the intention of the treaty to *limit* the liability of air carriers is to employ the last official United States price of gold. We agree with the court in *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 843 (S.D.N.Y. 1982), which, in holding as we do, stated:

> The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. The use of the last official United States price for gold means the use of a conversion factor chosen by the United States at the time the price was set to determine the relationship of this country's currency and those of other nations using a similar standard for conversion. Such a conversion factor, grounded in the policy of this country with respect to the value of its currency *vis-a-vis* all other currencies based upon the gold standard has a

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2. The Second Circuit in its opinion in *Franklin Mint v. Trans World Airlines*, No. 82-7012 (2d Cir. September 26, 1982), concisely pointed out the problems with each of the solutions raised by the parties:

> The last official price of gold is a price which has been explicitly repealed by the Congress . . . It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDRs are a creature of the IMF [International Monetary Fund], modified at will by that body and having no basis in the [Warsaw] Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Id. at 4 (citation omitted). The opinions in *Franklin Mint* and *In re Air Crash Disaster* at Warsaw, Poland, 535 F. Supp. 833, 839-42 (S.D.N.Y. 1982), discuss at length the arguments made for each of these theories.

> stability which would be entirely lost if the unit of conversion were subject to the fluctutations of a private commodities market relatively untouched by the regulating influence of any public policy.

We hold that the last official United States price of gold - $42.22 per ounce - governs the limitation on liability in this case.

For the above reasons, we grant Lufthansa's motion for summary judgment as to the use of the last official United States price of gold in calculating the limitation of liability in Article 22 of the Warsaw Convention. We deny Deere's cross-motion for summary judgment on this issue.

DATED: Dec. 30, 1982

ENTER..... JOHN R. GRODY
United States District Judge

[*The Netherlands v. Giants Shipping Corp.*,
Rechtspraak van de Week 321 (May 30, 1981)
(Sup. Ct. of The Netherlands May 1, 1981)]

TRANSLATION FROM DUTCH

The Supreme Court of the Netherlands

Having considered the petition of the State of the Netherlands, having its seat in The Hague (hereinafter "the State"), represented by Mr. E. Korthals Altes, Attorney, Barrister at the Supreme Court, said petition purporting to annul a decision of June 13, 1980 of the Court of Appeal of The Hague;

Having considered the written defense lodged by Giants Shipping Corporation, a corporation under Liberian Law, having its seat in Monrovia, Liberia (hereinafter "Giants"), represented by Mr. C. D. van Boeschoten, Attorney, likewise Barrister at the Supreme Court, said defense purporting, primarily, to declare inadmissible the appeal of the State, and, alternatively, to dismiss that appeal;

Having taken into account the pleadings of Attorney-General Haak—delivered also in the matter No. 11.705—purporting, in the matter under reference, to annul the Court's contested decision, but only insofar as it fixes the amount to which Giants' liability is limited at the equivalent in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of exchange of the day on which it [Giants] complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security for this amount, and, insofar as, subject to decision by the Supreme Court, it fixes the amount to which, for the moment, Giants' liability is limited, at 12,764,810 [units of] 1/15 Special Drawing Rights considered equivalent to the franc referred to in Article 740*d*, paragraph 4 of the Commercial Code, as these [Special Drawing Rights] are defined by the International Monetary Fund, converted into Netherlands money according to the valuation method applied by the Fund for its own operations and

transactions, at the rate of exchange of the day on which Giants complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security;

Having considered the contested decision and the other documents, from which it appears as follows:

By petition received on June 29, 1979, by the Clerk of the Court, Giants applied to the District Court at Rotterdam with the following requests:

> "a. to fix the amount to which Giants' liability, as mentioned in the petition, is limited for the moment at 12,764,810 gold francs, fixed at 65.5 milligrams of 900/1000 fineness;
>
> b. to order that a procedure be instituted for the distribution of this amount;
>
> c. to direct that Giants furnish security by means of a guaranty of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, having its seat in Hamilton, Bermuda, for a maximum amount of Fl. 2,210,000.00, increased by legal interest thereon from the day of the decision in this matter, and increased by an amount to cover the costs of the proceedings, to be fixed at Fl. 10,000.00.
>
> d. to order that, when Giants has satisfied the Court that it has complied with the order referred to under c., a magistrate be appointed to determine the statement of dividends of the aforementioned amount and also an administrator thereof;
>
> e. to order that the security bond referred to in this petition be returned when Giants has satisfied the Court that it has complied with the order referred to under c. and when Giants' petition is granted uncontested, or after any written defense has been conclusively rejected;".

Against this, the State lodged a written defense with the aforementioned Court, which contained the following requests:

"a. to fix, for the moment, the amount to which Giants' liability is limited at the market price of the quantity of gold corresponding to 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, to be calculated at the price on the conversion date as referred to in Article 740*d*, paragraph 4 of the Commercial Code;

b. to direct Giants to furnish good and valid security by means of a bank guaranty;".

The Court, having heard counsel for Giants and the State, among others, in chambers, decided on November 23, 1979, as follows:

"Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.

Directs Giants to furnish security for this amount by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, increased by legal interest from the date of this decision and also by an amount of Fl. 10,000.00 to cover the costs of these proceedings.

Rejects any other or additional claims.".

This decision is based on the following considerations:

"1. that Giants is owner and operator of the Liberian seagoing vessel "Blue Hawk," which collided on December 29, 1978, in Terneuzen with the northern bridge over the outer mole of the western lock and the brake mechanism at the east side of the outer mole of the western lock; that, with respect to that collision, claims for damage to property were lodged against Giants by the State, the Terneuzen municipality and the Taxicentrale [Cab Service] Terneuzen B.V.; that Giants wishes to avail itself of

the right to limitation of its liability with respect to said collision, granted it by virtue of Articles 740*a* through 740*d* of the Commercial Code;

2. that the Court fixes the net tonnage of the "Blue Hawk" as referred to in Article 740*d*, first paragraph, of the Commercial Code, and observing the stipulations in the third paragraph of said article, at 12,764.81 tons; that furthermore, the Court, pursuant, to the aforesaid article, limits, for the moment, Giants' aforementioned liability to, and fixes it at, 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness;

3. that Giants and the State, the latter being joined by the Terneuzen municipality and the Taxicentrale Terneuzen B.V., differ in opinion on the applicable conversion rate of those gold francs, as mentioned in the documents;

4. that, for lack of a valid contractual and/or statutory stipulation on a definite conversion rate to be applied, and also because no introduction of such stipulation can be expected, within a period that would be reasonable for the matter now before us, that might have allowed anticipation thereon, the Court can hardly determine anything other than that the free market value of the aforementioned legally defined quantity of gold determines at present the conversion rate, even if this implies a greater liability than that according to the arrangements applying until August 1, 1978;

5. that, since this is a case of limitation of liability deviating from that under Common Law, this exception should indeed not be interpreted more broadly to the disadvantage of the injured party, than ensues mandatorily from contract or law;

6. that in its petition Giants has offered to furnish security for the amount of liability to be fixed, increased

by interest and costs, by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, and the Court considers, under the circumstances of the case, such guaranty sufficiently good and valid security, now that the State has not further supported its opposition thereto;

7. that, insofar as Giants' requests as mentioned hereinabove under b. and d. are concerned, the Court shall not consider these matters before Giants has satisfied the Court that the directive stipulated below has been complied with, as these matters are considered premature at this stage of the request;

8. that, insofar as Giants' request as mentioned hereinabove under e. is concerned, it is not possible to entertain same, as such request cannot now be brought up;".

Giants appealed against this decision with the aforementioned Court of Appeal, which after hearing at its session of April 18, 1980, counsel for Giants and for the State, gave on June 13, 1980, the following decision, which is now contested in the present appeal:

"Annuls, upon appeal, the decision of November 23, 1979, of the Court in Rotterdam, insofar as it:

(1) fixes the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day security is furnished;

(2) rejects the request that the Court issue an order that a procedure be instituted for the distribution of the amount to which liability is limited;

and, deciding anew in these respects:

(1) fixes the amount to which liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixes at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of the day on which Giants complies with the order, given in the aforementioned decision, to furnish security for this amount;

(2) orders that a procedure shall be instituted for the distribution of the amount to which the liability is limited;

Upholds the aforementioned decision for the rest;

Returns the case to the Court in Rotterdam for further dealing with Giants' request;".

The considerations of the Court of Appeal in the case were:

"1. The present appeal is lodged against a decision given by the Court pursuant to Article 320*c* of the Code of Civil Procedure, on a request submitted by Giants to the Court pursuant to Article 320*a* of said Code.

2. The aforementioned request was to the effect, materially and insofar as is relevant at present, that Giants—submitting to avail itself of the right, granted it by virtue of Article 740*a* of the Commercial Code, to limitation of its liability for claims connected with the collision on December 29, 1978, of the seagoing vessel "Blue Hawk" with the northern bridge over the outer mole of the western lock in Terneuzen—requested to fix (provisionally) the amount of said limited liability, in accordance with the stipulations of Article 740*d* of said Code, at 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness and to order that Giants furnish security for same. The request was also to the effect that the Court give order that a procedure shall be instituted for the distribution of the aforementioned amount.

3. In its aforementioned decision, the Court granted the first request, in such a manner that the amount to which Giants' liability is limited for the moment, was fixed at "the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day the security is furnished," said security being ordered, at the same time, for said amount, increased by legal interest from the day of the decision and by an amount of Fl. 10,000.00 for the costs of the proceedings. The second request was rejected.

4. The appeal claims, firstly, that the Court wrongfully determined that the amount of the limited liability and the security to be furnished for same be calculated at the rate of the free market value of the mentioned gold francs, and it claims, secondly, that the Court wrongfully rejected the second request mentioned hereinabove.

5. First of all, the question arises whether the present decision is open to appeal, and the Court of Appeal must examine this question officially.

Relative to this question, it must be held that, by virtue of Article 345 of the Code on Civil Procedure, appeal is possible, because according to the law, and in particular also in Articles 320*a* through 320*z* and especially in Article 320*x* of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

As also the term [for appeal] mentioned in said article was observed, Giants' appeal is, therefore, admissible.

6. With respect to the first claim put forward by Giants, as stated hereinabove, it must be held that the

system of the procedure for the limitation of the liability mentioned in this case implies—as explicitly expressed in Article 740*d* of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with. Because at the time of the Court's decision and now, it is not certain at what time Giants shall furnish security, and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion in Netherlands currency of the gold francs must be made at the rate of the free market value thereof, so that this decision must be annulled in that respect. Therefore, all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

7. With respect to the second claim put forward by Giants, as stated hereinabove, it must be held that by virtue of the stipulations at the end of the first paragraph of Article 320*a* of the Code of Civil Procedure, and the further course of proceedings provided for in the subsequent articles of said Code, the decision granting the request as referred to in Article 320*a* must also order that a procedure be instituted for the distribution of the amount to which the liability is limited.

Therefore, the Court wrongfully rejected this request, so that the decision must be annulled in this respect and said order must yet be given.";

Considering that the State contests this decision, basing its appeal on the following grievances:

"Breach of justice and neglect of forms, non-observance of which brings about nullity, as the Court of Justice

considered Giants' appeal admissible for reasons mentioned in the aforementioned decision and which are considered repeated and included herein, and subsequently decided in the verdict of the contested decision, thereby partly annulling the decision of the Court in Rotterdam, as mentioned in the verdict of the contested decision, all this wrongfully for the following reasons:

a) The Court of Appeal wrongfully admitted Giants' appeal, reasoning that, by virtue of Article 345 of the Code of Civil Procedure, appeal is possible, because according to the law, and in particular also in Article 320*a* through 320*z* and especially in Article 320*x* of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

The legal system, as embodied in the Articles 320*a* through 320*z* of the Code of Civil Procedure, the nature of the present decision as well as, in particular, Article 320*x* of the Code of Civil Procedure, really does oppose the possibility of appeal against a decision such as the one under discussion, given by the Court by virtue of Article 320*c* of the Code of Civil Procedure.

b) The Court of Appeal held wrongfully that the system of the procedure for the limitation of the liability implies—as also explicitly expressed, according to the Court of Appeal, in Article 740*d* of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with, and that, as at the time of the Court's decision, like now, it is not certain at what time Giants shall furnish security and it is, therefore, not possible to determine, at

this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion into Netherlands currency of the gold francs must be made at the rate of the free market value thereof. The Court of Appeal also decided wrongfully that all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

Judging thus, the Court of Appeal omitted, wrongfully, to determine at which rate—of the day on which Giants complies with the order to furnish security—the amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness is to be computed.

In this respect, the Court of Appeal ought to have confirmed the contested decision of the Court in Rotterdam and fixed the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.";

Considering that Giants, in its statement of defense lodged with the Supreme Court, supported its appeal against the admissibility of the appeal to the Supreme Court by the State with the following arguments:

"The State apparently takes the position that it is one of the parties that appeared in one of the previous instances and that it can, therefore, appeal to the Supreme Court by virtue of Article 426, paragraph 1 of the Code of Civil Procedure. Giants is of the opinion that the State cannot be regarded as a party that appeared in the previous instances and was also not regarded as such by the Court of Appeal. In the appeal proceedings at the Court of Appeal the State has not submitted a statement of defense

and the Court of Appeal mentioned the State in its contested decision only as "... one of the parties mentioned by Giants toward whom it is of the opinion it can invoke the right to limitation of its liability." The nature of the proceedings under reference implies, furthermore, that those toward whom the limitation of liability can be invoked cannot oppose in a suit such as the one under reference the (provisional) limitation of the shipowner's liability, but must follow to that end the judicial proceedings initiated with the statement of defense by virtue of Article 320*g*, paragraph 1 of the Code of Civil Procedure. It results from the above that the State is not permitted to appeal to the Supreme court.

Whereas:

1. Giants argued that the State's appeal to the Supreme Court is not admissible, submitting that the State cannot be regarded as having appeared "in one of the previous instances" in the sense of Article 426, paragraph 1 of the Code of Civil Procedure. This argument must be rejected.

2. The Court mentions in its decision of November 23, 1979, that it has "seen" the State's statement of defense received on July 6, 1979, lodged by the State's solicitor E.C.G. Klinkhamer, Attorney. From this, it must be concluded that the Court permitted the State to submit a statement of defense. The decision also states that the Court, by virtue of its decision of July 6, 1979, which ordered, among other things, that the State be summoned, had heard B.D. Wubs, Attorney in The Hague, counsel for the State. All this means that the State did appear in the first instance in the sense of Article 426, paragraph 1. Though the creditors do not have the right to submit a statement of defense against a request as referred to by

Article 320*a* and though the judge is not obliged to summon the creditors mentioned by the petitioner, no stipulation in the law prevents the judge from permitting the submission of a statement of defense and from ordering the creditors to be summoned. In particular, the possibility provided for by Article 320*g*, paragraph 1, second sentence, to submit, when the distribution procedure proper has been started, a statement of defense relating to the points mentioned therein, does not prevent the judge from offering the opportunity for defense already in an earlier stage, i.e., that of dealing with the request as referred to in Article 320*a*. If a creditor availed himself of this opportunity, he did appear in the sense of Article 426, of paragraph 1.

Furthermore, as appears from the decision of the Court of Appeal on the written appeal lodged by Giants, B.D. Wubs, Attorney in The Hague, counsel for the State, was "heard at the session of April 18, 1980." This means that the State also did appear in the appeal before the Court of Appeal in the sense of Article 426, paragraph 1, even though the State—as Giants argued—did not lodge a statement of defense in the appeal proceedings.

The State's grievances as to the nonadmissibility of the appeal to the Supreme Court must therefore be rejected.

3. Part a. of the grievance refers to the question of whether the possibility of appeal by the petitioner—the debtor—is open on a decision on a request as referred to in Article 320*a*.

Firstly, the question arises if such a decision can be regarded as "a judgment of the Court" in the sense of Article 320*x*, paragraph 2. A combination of arguments leads to a negative reply.

The latter stipulation speaks of a "judgment," whereas in Article 320*i* the determination mentioned in Article 320*c* is called a "decision." Article 320*x*, paragraph 2, speaks of the "day of pronouncement"; it is not plausible

that in the system that was in the mind of the legislator, there was room for a pronouncement of a decision on a request as referred to in Article 320*a*. The short term for appeal—four weeks—is evidently connected with the legislator's desire to accelerate the distribution procedure; same can be started only after the debtor has complied with the order given him by the Court, as referred to in Article 320*c*, paragraph 1. The decision on the request referred to in Article 320*a*, however, precedes the distribution procedure proper, so that the reason to determine a short term for appeal does not apply here. Finally, the mandatory notification to the Clerk of the Court, stipulated in paragraphs 3 and 4 of Article 320*x*, is evidently connected with the tasks with which the Clerk of the Court is charged by various articles—such as Article 320*l* and Article 320*t*, paragraph 1—within the framework of the distribution procedure. The decision on a request as referred to in Article 320*a* is given, however, in an earlier stage and one cannot see what sense a notification to the Clerk of the Court would have at that stage.

All this leads to the conclusion that Article 320*x*, paragraph 2, does not refer to a decision on a request as referred to in Article 320*a*.

4. It should, therefore, now be examined if Article 345 implies that appeal on such a decision is open to the petitioner.

If the request is rejected, or is granted in such a manner that the petitioner—i.e., the debtor—is aggrieved by it, he may appeal against the decision by virtue of Article 345. Neither the law nor the nature of the decision are opposed to it. At this stage, the only question that is relevant is whether, and if so under which conditions, the debtor will be able to have the distribution procedure started. In these cases, the debtor has an interest to submit these questions to the judge in appeal. Article 320*g*, paragraph

1, last sentence—which the State invoked in particular—plays a role only in the next stage, i.e., in that of the distribution procedure proper. For this reason already, that article does not stand in the way of allowing the petitioner the right of appeal with respect to the decision on a request as referred to in Article 320*a*.

5. The above implies that the Court of Appeal was right in admitting Giants' appeal. Therefore, Part a. of the grievance must be rejected.

6. The grievance under b. has a twofold bearing. In the first place, it purports to argue that the Court should not have abstained from answering the question according to which criterion the amount of 12,764,810 gold francs, mentioned in the decision of the Court of Justice, should be converted into Netherlands currency. Furthermore, it purports to argue that that criterion should serve the free market value of the quantity of gold involved, on the day security is furnished.

The Supreme Court will address itself first to the question of whether the Court of Appeal should have expressed its opinion on the question of the criterion.

7. The arrangement contained in Articles 320*a*-320*z*, as determined by the Law of June 3, 1965, Official Gazette No. 239, differs, insofar as is relevant to this case, from the earlier arrangement, in the sense that under the present arrangement the court fixes the amount to which the liability of the debtor is limited for the moment (Article 320*c*, first paragraph), whereas, previously, the law (in the old Article 320*a*) referred, for the magnitude of the amount to be paid by the debtor, to the relevant articles of the Commercial Code. This means that under the old arrangement, it was initially left to the debtor to determine that amount—with the understanding that during the distribution procedure each creditor could contest the "sufficiency" thereof (old Article 320*l*)—whereas at present, the magnitude of the amount the debtor must pay, or

for which he must furnish security, is immediately put under the supervision of the court. The legislator, in so determining, will have intended that the calculation of the amount in accordance with the criteria mentioned in Article 740*d*, paragraphs 1, 2 and 3 of the Commercial Code shall be supervised. The question of what, for the conversion referred to in Article 740*d*, paragraph 4, should be considered as "the rate of the day" of payment, or of furnishing security, was not a problem in the opinion of the legislator; however, in the case before us, it does present a problem, since, as will be discussed in point 10 hereunder, at the time the Court of Appeal pronounced its decision—and also at the time of the decision of the lower court—the official parity of the guilder expressed in gold no longer existed. According to the documents of the case, this problem was the subject of a debate in the first instance and in the appeal; it was, in fact, the issue of the dispute. Under these circumstances, the Court of Appeal should not have abstained from answering this question.

As it is, the intent of the arrangement—that not the debtor but the judge fixes the amount to which the liability is limited for the moment—implies that the judge must express himself in the order to be given by virtue of Article 320*c*, paragraph 1, on the debated point of the criterion for conversion, to avoid that the debtor himself, when making payment or furnishing security, initially establishes the criterion for the conversion, and, therewith, the magnitude of the relevant amount. In this connection, it must also be noted that Articles 320*d*, 320*e* and 320*f*, paragraph 1 assume that by means of the order given by virtue of Article 320*c*, paragraph 1, it can be shown that the debtor complied with that order: and this also involves that the order should not leave any uncertainty—in cases such as the one before us—on the crucially important point of the criterion for conversion.

Therefore, Part b., insofar as it submits the grievance that the Court of Appeal wrongfully abstained from determining that criterion, is well-founded.

8. Insofar as Part b. purports to argue that the conversion referred to in Article 740*d*, paragraph 4 of the Commercial Code must be made with due regard to the free market value of gold, it must be rejected on the grounds following hereafter.

9. In its judgment of April 14, 1972, Netherlands Case Law 1972, 269, the Supreme Court gave a decision on the manner in which that conversion must be made, which was based, among other things, on considerations drawn from the wording, the history of the origin and the intent of the Treaty, concluded in Brussels on October 10, 1957, on the limitation of liability of owners of seagoing vessels, for the implementation of which Treaty Articles 740*a* through 740*d* were incorporated in the aforementioned Code. That decision held that, as long as there are international agreements among a large majority of countries that are a party to said Treaty, on the mutual currency relations that are based on a common valuation of gold, the conversion into Netherlands currency of the franc referred to in said article—hereinafter referred to, for the sake of shortness, as the franc—must be made on the basis of the official, i.e., the legally fixed, parity of the guilder expressed in gold at the time of said conversion, and not on the basis of the rate of gold quoted at that moment on the free market.

10. Since that time, far-reaching developments have occurred in the international monetary field, which led to the Second Amendment to the Articles of the Agreement of the International Monetary Fund (Journal of Treaties 1977, 40), approved for the Kingdom by the Law of March 23, 1978, Official Gazette 173, and, in connection therewith, to the introduction, effective as of August 1, 1978, of the Law concerning the rate of exchange of the

guilder, and the repeal, connected therewith and effective as of the same date, of the Law on the par value of the guilder.

These developments indicate, insofar as is relevant here, and as far as the Netherlands are concerned at least since the aforementioned date, that gold has lost all monetary significance. One cannot speak any more, at present, of an official parity of the guilder expressed in gold. This means that in the light of the objectives of the Treaty of 1957—as expressed by the Supreme Court in its aforementioned judgment—the appropriateness of the franc, expressed in gold, to serve as a generally accepted unit of account for determining internationally uniform limits of liability was lost.

11. Consequently, a lacuna occurred in Article 470*d* and in the stipulation of the treaty on which it was based. To fill same, steps were taken meanwhile, both on the international level and by national legislators, which led to the adjustment of the Treaty of 1957 to the new monetary situation by means of a Protocol established in Brussels on December 21, 1979, amending said treaty, and to similar adjustments of the national legal arrangements in various countries by means of legislative measures; in this country, a draft bill (No. 15.459) for such a law was passed by the Second Chamber of Parliament on February 17, 1981.

However, as long as the adjustment arrangement as referred to hereinabove has not yet force of law in the Netherlands, the judge cannot—also because of the considerations under point 7 hereinabove—abstain from giving a conversion standard.

12. The point of departure should be the preference—underlying the Treaty and, therefore, Article 740*d* as well—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty.

To convert the franc in the manner the State pleads in these proceedings, according to the price of gold on the free market, would be contrary to this point of departure. The aforementioned point of departure will rather lead to joining the choice made by the Member States of the International Monetary Fund for a unit of account which is suited to be used as such in international payments, since gold has ceased to be a monetary standard. The choice fell on the Special Drawing Right (SDR) of the aforementioned Fund, the value of this unit being initially expressed in gold, i.e., a weight amounting to approximately 15 times the gold weight of the aforesaid franc.

This ratio, and the circumstance that, when gold as a value standard of the SDR was replaced by a collection of national currencies (the so-called standard basket), and the new criterion was chosen in such a manner that at the moment of change, the value of the SDR was the same according to both criteria, make it possible to join this choice by considering the franc equal to 1/15 SDR for its conversion into Netherlands currency and to effect the conversion according to the valuation method applied by the Fund for its own operations and transactions.

13. To fill the lacuna in this manner is in harmony with the legal conceptions adopted since, as these find their expression in the arrangements made recently that aim at the adjustment of international treaties and national laws to the changed monetary situation. With respect to various treaties in which the franc is used as unit of account, amending protocols were adopted, such as the one already mentioned, that prescribe that the franc be considered equal to 1/15 SDR for conversion into national currency; the same applies with respect to the adjustment legislation adopted in several countries and, likewise, the aforementioned draft bill opted for this solution.

14. Objecting to conversion of the franc on the basis of 1/15 SDR, the State submitted that the value of the SDR

in terms of purchasing power had considerably declined since the time when this unit was still expressed in the aforementioned weight of gold; as a consequence thereof, conversion of the franc on the aforementioned basis leads to a real reduction, which cannot be neglected, in the liability limits provided for in the Treaty and in Article 740*d*. This circumstance cannot, however, become a decisive factor when the judge makes his choice on how to fill the lacuna. Even if the aforementioned limits would require revision in connection with the decline of the purchasing power of the unit of account to be applied, it is not the task of the judge to provide for this, but it is up to the legislative body of the treaty and/or the national legislator to intervene.

It is worth noting, in this connection, that on November 19, 1976, a Treaty was concluded in London—which has not yet taken effect, however—on the limitation of liability for maritime claims (Journal of Treaties 1980, 23). This Treaty is intended to replace the Treaty of 1957 and contains considerably higher limits of liability, expressed in SDRs.

15. The fact that Part b. of the grievance, insofar as it concerns the complaint described hereinabove at the end of point 7, is founded, implies that the decision of the Court of Appeal cannot be upheld, insofar as the Court of Appeal held that it could abstain from making a decision on the point in dispute between Giants and the State concerning the conversion criterion to be applied. The Supreme Court can settle the case itself.

It follows from the above considerations concerning the conversion criterion, that grievance 1 of the appeal is founded, insofar as it argues that the franc is to be considered equal to 1/15 SDR for the purpose of conversion. No appeal to the Supreme Court was made against the decision of the Court of Appeal on grievance 2.

The above leads to the conclusion that the decision of the Court of Appeal only need be completed to the extent that it is necessary to state the criterion—mentioned below—for the conversion of the amount in francs mentioned by the Court of Appeal;

Annuls the decision of the Court of Appeal, but only insofar as the Court of Appeal omitted to state the criterion according to which the relevant amount in francs is to be converted;

Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 francs fixed at 65.5 milligrams gold of 900/1000 fineness, this franc to be considered equal to 1/15 Special Drawing Right as it is defined by the International Monetary Fund, and at the rate of the day on which security is furnished, to be converted in Netherlands currency in accordance with the valuation method applied by the Fund for its own operations and transactions;

Rejects the appeal in all other respects.

So done by Deputy Chief Justice Ras and Justices Haardt, Royer, Martens and de Groot, and so pronounced by the aforementioned Mr. Haardt, Attorney, in public session on the first of May nineteen hundred and eighty-one, in the presence of the Attorney-General.

(signatures)

(signature)

.....

(Rubber stamp:
Certified true copy)

The Clerk of the Supreme Court of the Netherlands

(signature)

.....

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

IRWIN STYLES

State of New York
County of New York ss.:

Sworn to before me this 28th day of July, 1981

BARNEY ROSE,
NOTARY PUBLIC State of New York
No. 41-3343010, Qual. in Queens Co.
Cert. Filed in N. Y. County.
Commission Expires March 30, 1983

FOR INFORMATION

CIVIL AERONAUTICS BOARD MEMORANDUM

May 20, 1981

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.[1] There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been further refined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as well in the hope of reaching interagency agreement.

1 This Bureau wrote the first memorandum in March, 1980. BIA and BDA wrote reply memos in April, 1980.

This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. Background

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.[1a] Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.[2] Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, *i.e.*, the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the liability limits. 14 C.F.R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by

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1a. 49 Stat. 3000.

2. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 498-500 (1967). See also Horner & Legrez, Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929 (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

Section 403 (a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U.S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, *i.e.*, (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting currencies. The Board has not taken any action on the recommendation.

II. Discussion

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and, conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time

governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from unforeseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and/or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency."[3] The use of gold was thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of

3. H. Drion, *Limitations of Liabilities in International Air Law* 1954, p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc - Replacement of Unit of Account," LMCLQ 31 (1978); Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5. J. Maritime L. and Com. 645 (1973-74); Norway, "Conversion from Poincare Franc to National Currency," presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2LMCLQ 169, 171 (1979).

the market rate. The official rate of gold, at least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.[4] Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.[5] ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which provides a strong indication of how other participating countries feel.[6]

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic

4. The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.
5. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).
6. *See* footnote 4.

ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.[7] If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January, 1977. Its failure to either ratify or reject the Protocol makes determination of the proper conversion rate difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.[8]

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert

7. Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing Internation Carriage by Air," 42 J.Air L. & Comm. 273, 325, 329-30 (1976).

8. Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.[9] This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however, may at times prevent passengers from recovering the full extent of damages caused by carriers.[10] Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

JOHN GOLDEN
John Golden

Prepared by;

STEVEN ROTHENBERG
Ext. 3-5943

9. Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

10. The limits are $9.07 per pound for checked luggage, $400 for carry-on bags and approximately $10,000 per passenger. The $10,000 limit is superseded, however, by a $75,000 limit adopted by carriers in 1966.

Respectfully submitted,

JOHN N. ROMANS
ROBERT S. LIPTON
101 Park Avenue
New York, New York 10178
(212) 696-6000
Counsel for Petitioner,
Trans World Airlines, Inc.

CURTIS, MALLET-PREVOST,
COLT & MOSLE
SCOTT J. MCKAY WOLAS
MICHAEL L. M. QUINTTUS
Of Counsel

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